No. 15-680

IN THE

Supreme Court of the United States

GOLDEN BETHUNE-HILL, CHRISTA BROOKS, CHAUNCEY BROWN, ATOY CARRINGTON, DAVINDA DAVIS, ALFREDA GORDON, CHERRELLE HURT, THOMAS CALHOUN, TAVARRIS SPINKS, MATTIE MAE URQUHART, VIVIAN WILLIAMSON, AND SHEPPARD ROLAND WINSTON,
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org
Counsel for Amicus Curiae

September 14, 2016 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the Fourteenth and Fifteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

To enforce the Fifteenth Amendment's guarantee of political equality, the Voting Rights Act requires states, in certain circumstances, to draw majority-minority districts to ensure that minority voters have the opportunity to elect representatives of their choice. The Act's requirement of equal opportunity can be invoked only on the basis of hard evidence—a showing, for example, that entrenched racial bloc voting by white majorities relegates cohesive minority voters to the status of political losers—not racial suppositions.

Here, however, the Virginia legislature drew twelve majority-minority districts based on one in-

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief.

flexible racial quota that it applied to all districts; indeed, rather than taking a hard look at political conditions on the ground, the Virginia legislature ignored differences of geography, demographics, and political history. The resulting districts violate the guarantees of equality contained in the Fourteenth and Fifteenth Amendments, and turn the Voting Rights Act on its head.

In the wake of the 2010 Census, the Virginia Legislature redrew its state legislative districts. The map for the Virginia House of Delegates approved by the Virginia legislature used a fixed racial quota. The lawmakers in charge of drawing new lines insisted that, in each of the map's twelve majority-minority districts, the African American voting age population ("BVAP") had to be at least 55%. Regardless of geography, demographics, or political history, the Virginia legislature treated the 55% BVAP quota as non-negotiable. Thus, the Virginia legislature did not do the work of determining whether, in each of the twelve districts, a 55% BVAP was necessary to ensure that African Americans could elect representatives of their choice. It simply applied the mechanical 55% quota across the board without considering whether it was overpacking minorities into certain districts. Not surprisingly, the resulting districts were misshapen, further reflecting the Virginia legislature's predominant reliance on race in drawing the district lines. Such racial gerrymandering cannot be squared with the guarantees of the Fourteenth and Fifteenth Amendments.

The Fifteenth Amendment establishes a broad prohibition on racial discrimination in voting, "reaffirm[ing] the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as

simple in command as it was comprehensive in reach." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). The Fifteenth Amendment not only outlaws state regulations that "deny" the right to vote on account of race, it also expressly outlaws state voting regulations that "abridge" that right. As the text and history of the Fifteenth Amendment show, the Framers of that Amendment recognized that a broad prohibition on all forms of racial discrimination in voting, coupled with a broad legislative enforcement power, were critical to ensuring "the colored man the full enjoyment of his right." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). Using a mechanical racial quota to overpack minorities into certain districts—and thereby curbing their influence elsewhere—violates the Amendment's command as surely as denial of access to the ballot itself. *See Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015) (observing that "when the State adds more minority voters than needed for a minority group to elect a candidate of its choice," a racial gerrymander may "harm the very minority voters that Acts such as the Voting Rights Act sought to help").

This Court's cases construing the Fourteenth Amendment's guarantee of equal protection, too, establish that "a racially gerrymandered districting scheme . . . is constitutionally suspect." *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (hereinafter *Shaw II*). "[R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters" and "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody." *Shaw v. Reno*, 509 U.S. 630, 650, 657 (1993) (hereinafter *Shaw I*). When a plaintiff establishes "through

circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose" that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a district," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), the racially gerrymandered districting plan must be held invalid unless the government can satisfy strict scrutiny, "our most rigorous and exacting standard of constitutional review." *Id.* at 920.

The district court turned a blind eye to these fundamental principles. It upheld the challenged districts even though the Virginia legislature "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)," *Alabama Legislative Black Caucus*, 135 S. Ct. at 1267. As a result of the inflexible 55% BVAP rule, "[r]ace was the criterion that, in the State's view, could not be compromised; respecting [traditional districting criteria] came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907. Permitting the across-the-board use of a mechanical racial target cannot be squared with the imperative of racial equality reflected in the Fourteenth and Fifteenth Amendments.

The mapmakers in the Virginia legislature claimed that the 55% rule was necessary to comply with the protections of the Voting Rights Act, but the Act—which enforces the Fifteenth Amendment's broad ban on racial discrimination in voting—requires courts to "take account of all significant circumstances," not "mechanically rely upon numerical percentages." *Alabama Legislative Black Caucus*, 135 S. Ct. at 1273. Virginia's use of an inflexible 55% quota—which has no apparent source—perverts the

Act and the constitutional principles it enforces, substituting racial stereotype for the "'intensely local appraisal,'" *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)), of political reality the Act demands to redress "the demonstrated ingenuity of state and local governments in hobbling minority voting power." *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994). Virginia cannot satisfy strict scrutiny based on a caricature of the Act's protections. The judgment below should be reversed.

ARGUMENT

I. THE FOURTEENTH AND FIFTEENTH AMENDMENTS FORBID RACIALLY GERRYMANDERED DISTRICTS.

In language "as simple in command as it [is] comprehensive in reach," *Rice*, 528 U.S. at 512, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "Fundamental in purpose and effect . . . the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Rice*, 528 U.S. at 512; *see also Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) (noting "the transformative effect the Fifteenth Amendment aimed to achieve").

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers chose sweeping language requiring "the equality of races at the

most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 512. Striking broadly against all forms of racial discrimination in voting—whether denials or abridgments—the Framers explained that the Fifteenth Amendment would be "the capstone in the great temple of American freedom," Cong. Globe, 40th Cong., 3d Sess. 724 (1869), that would make "every citizen equal in rights and privileges." *Id.* at 672.

Tragically, efforts to circumvent the Fifteenth Amendment's broad mandate of equality emerged almost immediately. "Manipulative devices and practices were soon employed to deny the vote to blacks," *Rice*, 528 U.S. at 513, or to "reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw I*, 509 U.S. at 641 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). As this Court in *Shaw I* noted, one of the "weapons in the States' arsenal was the racial gerrymander—'the deliberate and arbitrary distortion of district boundaries . . . for racial purposes.' In the 1870s, for example, opponents of Reconstruction in Mississippi 'concentrated the bulk of the black population in a 'shoestring' congressional district running the length of the Mississippi River, leaving five others with white majorities.'" *Id.* at 640 (citations omitted). The state's manipulation of district boundaries, as one congressman observed, was designed for the purpose of "gerrymandering all the black voters as far as possible into one district so that the potency of their votes might not be felt as against the potency of white votes in the other districts." 13 Cong. Rec. H3442 (daily ed., Apr. 29, 1882).

Other states, too, relied on racial gerrymandering, in order, in the words of one Texas newspaper, "to disenfranchise the blacks by indirection." Austin

Statesman, Feb. 3, 1876, at 1, https://texashistory.unt.edu/ark:/67531/metapth277561/m1/1/. In the 1870s, North Carolina mapmakers packed African Americans into a single district—known as the Black Second—"effectively confin[ing] black control in a state that was approximately one-third African American to a maximum of one district in eight or nine." J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 26 (1999). In 1882, the South Carolina legislature created a district, known as the "boa constrictor" district, that snaked across the state to include "all the precincts of black voters that could be strung together with the faintest connection of contiguous territory." *Flaws in the Solid South*, N.Y. Times, July 13, 1882, http://query.nytimes.com/mem/archive-free/pdf?res=9A05E2D9173DE533A25750C1A9619C94639FD7CF. Throughout the South, state governments packed African American voters into gerrymandered districts in order to undercut the Fifteenth Amendment's guarantee of equal political opportunity. *See* Chandler Davidson, *White Gerrymandering of Black Voters: A Response to Professor Everett*, 79 N.C. L. Rev. 1333, 1334 (2001) ("Briefly put, whites have ruthlessly, systematically, and pretty much without hindrance gerrymandered African-American voters in this country from Reconstruction to the modern era.").

This Court has since made clear that the Fifteenth Amendment prohibits any "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), equally forbidding laws that deny the right to vote outright on account of race as well as those that

abridge it. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (explaining that the "core meaning" of "'abridge'" is "'shorten'" (quoting *Webster's New International Dictionary* 7 (2d ed. 1950))); *id.* at 359 (Souter, J., concurring in part and dissenting in part) ("[A]bridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden."). The Fifteen Amendment, as construed by this Court, "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane*, 307 U.S. at 275.

Thus, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court struck down racial gerrymandering by the City of Tuskugee, Alabama as a violation of the Fifteenth Amendment's commands. The city had attempted to redefine its boundaries "from a square to an uncouth twenty-eight-sided figure" for the purpose of "segregating white and colored voters." *Id.* at 340, 341. This Court had little difficulty in concluding that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.* at 347. *Gomillion* held that "the Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the States' power to draw political boundaries." *City of Mobile v. Bolden*, 446 U.S. 55, 85 (1980) (Stevens, J., concurring); *see Holder v. Hall*, 512 U.S. 874, 958 (1994) (opinion of Stevens, J.) (observing that "the Court's first case addressing a voting practice other than access to the ballot arose under the Fifteenth Amendment").

Gomillion rested on the Fifteenth Amendment, but its result was equally "compelled by the Equal Protection Clause of the Fourteenth Amendment."

Bolden, 446 U.S. at 86 (Stevens, J., concurring). Since *Gomillion*, this Court's cases have read the Fourteenth Amendment's more general requirement of equal protection to complement the Fifteenth Amendment's specific prohibition on all forms of racial discrimination in voting. *See Rogers v. Lodge*, 458 U.S. 613 (1982) (vote dilution); *Shaw I*, 509 U.S. at 642-49 (racial gerrymandering); *cf. Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion) ("If there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."). Indeed, *Shaw I* was quite explicit in drawing on *Gomillion* and other "voting rights precedents" interpreting the Fifteenth Amendment. *Shaw I*, 509 U.S. at 644.

This Court's cases, whether decided under the Fourteenth Amendment or the Fifteenth Amendment, have repeatedly affirmed that the Constitution does not tolerate racial discrimination in voting or the drawing of district lines. *See Rice*, 528 U.S. at 517 ("[T]he use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."); *Shaw I*, 509 U.S. at 645 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."); *Gomillion*, 238 U.S. at 346 ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."). As the next Sections show, the Virginia legislature's use of a mechanical racial quota in drawing district lines violates these principles.

II. VIRGINIA'S USE OF AN INFLEXIBLE, RACIAL QUOTA TO DRAW LEGISLATIVE DISTRICTS MUST SATISFY STRICT SCRUTINY.

Under this Court's precedents, to bring a racial gerrymandering claim, a plaintiff must "'show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Alabama Legislative Black Caucus*, 135 S. Ct. at 1267 (quoting *Miller*, 515 U.S. at 916). "The 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." *Id.* at 1271. When a state legislature uses race as the predominant factor, the districting plan must be held invalid unless the government can satisfy strict scrutiny, "our most rigorous and exacting standard of constitutional review." *Miller*, 515 U.S. at 920.

In *Alabama Black Legislative Caucus*, this Court elaborated on when the use of race is a predominant factor, making strict scrutiny applicable. There, the state legislature drew districts that sought to maintain the "existing racial percentages in each majority-minority district." 135 S. Ct. at 1271. This Court held that the state's use of "a policy of prioritizing of mechanical racial targets above all other districting criteria (save one-person, one-vote)" was "strong, perhaps overwhelming evidence that race did predominate" in the drawing of district lines. *Id.* at 1267, 1261. As the Court noted, the line-drawers surgically moved African American citizens into majority-minority districts to comply with the state's chosen

mechanical racial target. *Id.* at 1271 (observing that "[o]f the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white").

As the evidence recounted by the district court confirms, the same predominant focus on race above all else occurred here. The state's mapmakers insisted that each one of the twelve House of Delegates majority-minority districts—regardless of geography, demographics, or political history—contain at least a 55% BVAP, though no one could offer any coherent explanation of the source of the rule. *See* Juris. Statement App. ("J.S. App.") at 23a (calling the source of the rule "a muddle"). At trial, the state conceded that the 55% quota "was used in structuring the districts." *Id.* at 19a. To meet this inflexible percentage, those in charge of drawing the state's House districts "deliberately moved black voters into these majority-minority districts," *Alabama Black Legislative Caucus*, 135 S. Ct. at 1266; Appellants' Br. at 28-29, 31, 37-38, 39, 43-44, 45, 51 (detailing this evidence), splitting county lines for "avowedly racial" reasons, J.S. App. at 93a, and drawing districts that were, as the court below recognized, "unusually shaped," *id.* at 92a, and "unusually configured," *id.* at 121a.

Indeed, in the case of District 75, the legislature had to resort to "drastic manuevering," *id.* at 97a, to draw lines that complied with the unyielding 55% BVAP quota. In another, as the district court observed, the state legislature had drawn boundaries "'that wind[] [their] way around low BVAP precincts . . . to capture high BVAP precincts.'" *Id.* at 121a. The evidence showed that the 55% BVAP quota was, as Judge Keenan's dissent put it, a "racial filter"

through which "all line-drawing decisions had to pass." *Id.* at 138a.

Despite this mountain of evidence, the district court majority held that, with the exception of District 75, race did not predominate in the drawing of the twelve House of Delegate majority-minority districts, stressing that "the boundaries" chosen by the legislature were "justifiable by reference to traditional, neutral criteria." *See, e.g., id.* at 109a; *see also id.* at 114a (describing court's role as "verifying a district's overall compliance with neutral criteria"). This was error. As this Court explained in *Shaw II*, the test is not whether the state has acted consistent with traditional districting principles. "That the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration. Race was the criterion that, in the State's view, could not be compromised; respecting [traditional districting principles] came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907. The same is true here. As Judge Keenan observed in dissent, the legislature's "one-size-fits-all quota automatically made racial sorting a priority over any other districting factor." J.S. App. at 133a. In drawing the district lines, the legislature treated the 55% BVAP quota as non-negotiable: any changes to the maps inconsistent with the inflexible 55% rule were rejected out of hand. *See* Appellants' Br. at 20-24, 38-41, 42, 49.

Strict scrutiny, therefore, applies. As the next section shows, Virginia's claim that the challenged districts satisfy strict scrutiny because they were necessary to comply with the protections of the Voting Rights Act is without merit.

III. USE OF MECHANICAL RACIAL QUOTAS, IN PLACE OF EVIDENCE, TO DRAW DISTRICT LINES CANNOT BE SQUARED WITH THE VOTING RIGHTS ACT.

The state legislators in charge of drawing the House of Delegate districts claimed that, to comply with Section 5 of the Voting Rights Act (which at the time of redistricting applied to voting changes made by the Virginia legislature), the state's twelve majority-minority districts—regardless of geography, demographics, or political history—had to be drawn on the basis of a 55% BVAP quota. See J.S. App. at 19a, 87-88a. This argument—which is based on racial supposition, not evidence—finds no support in the Voting Rights Act, and "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw I*, 509 U.S. at 657.

Section 5 of the Voting Rights Act, as amended, which prior to this Court's decision in *Shelby County* covered certain States and other jurisdictions, prohibits a covered jurisdiction from adopting any voting change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice." 52 U.S.C. § 10304(b). In *Alabama Legislative Black Caucus*, this Court rejected the argument that the Voting Rights Act required Alabama to maintain existing racial percentages in each majority-minority district in order to comply with Section 5. The preclearance requirement of Section 5, the Court explained, "does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what

the language of the statute says." *Alabama Legislative Black Caucus*, 135 S. Ct. at 1272. Thus, a state relying on the Voting Rights Act to draw districts predominantly on the basis of race must have hard evidence that such district lines are necessary; it cannot simply rely on racial quotas. As the Court made clear, "courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances." *Id.* at 1273; *see* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 Fla. St. U. L. Rev. 573, 576 (2016) ("[T]he notion that it is possible to rely on a few census statistics to guarantee compliance with the obligations of the Voting Rights Act betrays the central statutory insight. By assuming that functional political cleavages can be measured purely by percentage of citizen voting-age population, the troublesome approach imposes racial stereotypes on a statute designed to combat them.").

Significantly, the language—quoted above—that this Court found dispositive in *Alabama Legislative Black Caucus* was added to the Voting Rights Act in the wake of this Court's opinion in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which held that it does not necessarily violate the Voting Rights Act for safe majority-minority districts to be replaced by other districts in which minorities may influence the outcome of elections. In requiring jurisdictions to maintain a minority's ability to elect candidates of their choice, "Congress rejected this Court's decision in *Georgia v. Ashcroft* . . . and it adopted the views of the dissent," *Alabama Legislative Black Caucus*, 135 S. Ct. at 1273, which argued that the Voting Rights Act requires a contextual analysis based on the totality of circumstances, not simply racial percentages. *Georgia*, 539 U.S. at 498 (Souter, J., dissenting) ("[T]he

simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive."); *id.* at 504 (Souter, J., dissenting) ("Knowing whether the number of majority BVAP districts increases, decreases, or stays the same under a proposed plan does not alone allow any firm conclusion that minorities will have a better, or worse, or unvarying opportunity to elect their candidates of choice. Any such inference must depend not only on trends in BVAP levels, but on evidence of likely voter turnout among minority and majority groups, patterns of racial bloc voting, likelihood of white crossover voting, and so on."); *id.* at 509 (Souter, J., dissenting) ("Section 5 can only be addressed, and the burden to prove no retrogression can only be carried, with evidence of how particular populations of voters will probably act in the circumstances in which they live."); *cf. Johnson*, 512 U.S. at 1020-21 ("No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.").

This Court's decision in *Alabama Legislative Black Caucus* requires a state to have a "strong basis in evidence" that compliance with the Voting Rights Act required drawing districts predominantly on the basis of race, see 135 S. Ct. at 1273-74, but here Virginia has no evidence at all for the choice it made. Indeed, as the district court observed, the state's mapmakers could not even agree on the source of the inflexible 55% BVAP quota they applied across-the-board to the state's twelve House of Delegate majority-minority districts regardless of geography, demographics, or political history. *See* J.S. App. at 23a-25a. Some attributed the 55% rule to the Department of Justice, but DOJ guidelines specifically pro-

vide that "preclearance determinations are not based 'on any predetermined or fixed demographic percentages.'" *Alabama Legislative Black Caucus*, 135 S. Ct. at 1272 (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011)). Others claimed that the 55% rule came from the community or from the legislators in charge of rewriting the maps, J.S. App. at 24a, but none could pinpoint or explain the factual basis for the rule. Perhaps closest to the truth was Delegate Ward Armstrong, who explained, that "as far as [he] could tell, the number was almost pulled out of thin air." *Id.* On this record, the use of a "mechanically numerical view as to what counts as forbidden retrogression," *Alabama Legislative Black Caucus*, 135 S. Ct. at 1273, does not come remotely close to satisfying the rigors of strict scrutiny.

Despite the massive hole in the state's defense, the district court majority held that the drawing of District 75 satisfied strict scrutiny. To reach this result, the majority applied a test more akin to rational basis review, upholding the district on the basis that the legislature had made a "reasonable determination," J.S. App. at 102a, that a 55% BVAP floor was required to prevent retrogression. Strict scrutiny requires more. The paltry evidence offered by the state—based on vague assertions—does not amount to the "strong basis in evidence" required by this Court's precedent. *See* Appellants' Br. at 57-59.

The problem here is not Virginia's decision to draw majority-minority districts, but the means the state legislature used to do so. States have authority to draw majority-minority districts to effectuate the Constitution's and the Voting Rights Act's mandate of equal political opportunity, but they must do so on the basis of hard evidence, not racial quotas. That

ensures the vitality of the Fifteenth Amendment's guarantee of equal political opportunity, "render[ing] equitable opportunity for minority communities without indulging in essentialism." Levitt, *supra*, at 587; *see also Johnson*, 512 U.S. at 1019-20 (rejecting rule of law that would tend to "promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity"). Because Virginia drew its twelve House of Delegate majority-minority districts on the basis of a racial BVAP quota, ignoring any differences in the geography, demographics, or political history among these districts, the judgment below should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

September 14, 2016

* Counsel of Record